SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1224

GUARANTEE RESERVE LIFE INSURANCE COMPANY,
Plaintiff in Interpleader

WORLD MARKET CENTERS, INC., Bankrupt,
Petitioner,

VERSUS

JUNE D. HARDIN,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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In the

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OCTOBER TERM, 1975

No. .....

GUARANTEE RESERVE LIFE INSURANCE COMPANY,
Plaintiff in Interpleader

WORLD MARKET CENTERS, INC., Bankrupt,
Petitioner,

VERSUS

JUNE D. HARDIN,
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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

TO *the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Respondent, June D. Hardin, prays this Court deny this Petition for Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in that court in the above entitled case, affirming the judgment of the United States District Court for the Western District of Oklahoma, sitting at Oklahoma City, Oklahoma.

OBJECTION TO JURISDICTION

The Respondent, June D. Hardin, objects to World Market Centers' Petition for a Writ of Certiorari because it fails to present any reason why the cause should be reviewed by this Court. Rule 19, Supreme Court Rules. The decision of the United States Court of Appeals for the Tenth Circuit, affirming that of the United States District Court for the Western District of Oklahoma, is not in conflict with decisions of this Court or of other courts of appeal on the same matter. The decision did not involve an important question of federal law which has not, but should be, settled by this Court. The Tenth Circuit did not depart from the accepted and usual course of judicial proceedings.

The five questions presented by the petitioner, World Market Centers, Inc., essentially reiterate its contention that in every case, the Bankruptcy Court must determine if the claim is substantial or colorable. Petitioner cites no case to substantiate this contention.

Title 11, U.S.C., §46 reads, in part:

> "46. Jurisdiction of United States and state courts.—(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act [this title], between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
>
> "(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the

> bankrupt might have brought or prosecuted them if proceedings under this Act [this title] had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act. . . ."

This Act is not contingent. It does not say that jurisdiction in another court vests after the Bankruptcy Court decides whether or not it will take jurisdiction. Although not crucial to the question presented by the petitioner, and not a consideration for the purposes of this brief, it is of more than passing interest that the Bankruptcy Court did, in the instant case, decline to take jurisdiction. When it entered its preliminary injunction on December 19, 1972, against litigation of the insurance claim, it specifically excepted the subject action. Moreover, in its Order dated January 29, 1973, it specifically acknowledged the jurisdiction of the United States District Court for the Western District of Oklahoma and dismissed Guarantee Reserve and June D. Hardin from the bankruptcy proceedings. In the Order the Bankruptcy Court found that the United States District Court for the Western District of Oklahoma had jurisdiction over the parties and that it appeared to the Bankruptcy Court "that the face value of such policy in the amount of $100,000.00 has been deposited into the registry of the United States District Court for the Western District of Oklahoma, and that it is subject to the jurisdiction and decrees of said Court. . . ." Copies of the Orders of December 19, 1972 and January 29, 1973, are attached hereto. These actions of the Bankruptcy Court were proper.

THE BANKRUPTCY COURT DOES NOT HAVE JURISDICTION TO ENFORCE A CHOSE IN ACTION AGAINST AN OBLIGOR, EVEN IF IT IS CLEARLY OWNED BY THE BANKRUPT.

Possession of an insurance policy, where the possessor is not the named owner or beneficiary, is at best a chose in action. *In re Lissak*, 110 F.2d 370 (C.A. 2, 1940). The Court of Bankruptcy never has summary jurisdiction to enforce a chose in action against an obligor even if it is clearly owned by the bankrupt. The following discussion by the Court in *In re Lehigh and Hudson River Railway Company*, 468 F.2d 430 (C.A. 2, 1972), is pertinent:

> "At the outset, it is well to correct a misconception resulting from Lehigh's reliance on the statement in 2 Collier, Bankruptcy ¶ 23.05 [4], at 485 (1971), cited by the district court:
>
> > 'Where the character of the property is such that it is not capable of tangible or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court regarding such property.'
>
> The discussion makes clear that this statement refers to conflicting claims of the bankrupt and others to the *ownership* of such intangibles; in such cases the rule with respect to choses in action is the same as that with respect to tangible property. But, as is explained in the final sentence of the subsection, id. at 489-90, and the cases cited in fn. 33, the bankruptcy court does not have summary jurisdiction to *enforce* a chose in action against the bankrupt's obligor, even when the bankrupt's rights seem clear, Judge Learned Hand made the distinction, with his customary clarity, in In re Roman, 23 F.2d 556 (2 Cir. 1928). . . ."

THE FUNDS OF THE INSURANCE POLICY DEPOSITED WITH THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT CONSTITUTED THE RES THAT GAVE IT JURISDICTION.

The rule, in such cases, is set out at 9 Am.Jur.2d *Bankruptcy* §44:

> "Property in possession of bankrupt or in custody of court.
>
> "*Control of the res is the test of jurisdiction of a court of bankruptcy directly to determine the right to and the disposition of property.* Bankruptcy courts have jurisdiction, exercisable in summary proceedings, to adjudicate controversies relating to property over which they have actual or constructive possession. The principle, which is not peculiar to courts of bankruptcy, but applicable to all courts both state and federal, is that where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, and the court has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property." (Emphasis supplied.)

The distinguishing factor in the holding of *Murphy-Palmer Seeds, Inc.* v. *Mert L. Mitchell, Trustee in Bankruptcy*, 425 F.2d 705 (4 Cir., 1970), cited by petitioner in support of his position, is that there the bankrupt was the insured. That case involved a lien, or claim, against the bankrupt estate, whereas the subject case involves a claim by the trustee on funds not accessible to him except through a court order.

So, too, *Katchen* v. *Landy*, 382 U.S. 323, 15 L.Ed.2d 391, 86 S.Ct. 467 (1966), cited by the petitioner, was concerned with the allowance of claims on the bankrupt's assets, the reverse of the situation at bar.

Although involving different fact situations, both *Phelps* v. *United States*, 421 U.S. 330, 44 L.Ed.2d 201, 95 S.Ct. 1728 (1975), and *Taubell-Scott-Kitzmiller* v. *Fox*, 264 U.S. 426, 68 L.Ed. 770, 44 S.Ct. 396 (1924), also cited by petitioner, held that the bankruptcy court lacked jurisdiction summarily to adjudicate the controversy.

The petitioner, at pages 15 and 16 of his brief, alleges the deceased never performed certain "conditions precedent." He contends the Court of Appeals' finding is tantamount to a finding that ownership was in the debtor at the institution of the proceeding under Chapter XI of the Bankruptcy Act." This logic is elusive. To clarify the situation, the Respondent emphasizes that the only "conditions precedent" to which petitioner might refer were Hardin's expressed intention perhaps to reduce, or to change, or to assign the policy. He died before he could complete any of those actions. However, the conditions precedent to the effectiveness of the policy itself were met: application, consideration, and acceptance by the carrier, Guarantee Reserve Life Insurance Company. These conditions precedent are the relevant ones, and have not been contested by any party to this suit. The finding of the trial court that the widow, June D. Hardin, was entitled to the proceeds of the policy deposited in the interpleader action is a fact question not here on review.

JURISDICTION OF THIS ACTION VESTED IN THE TRIAL COURT WHEN THE INSURANCE CARRIER COMMENCED HIS ACTION IN INTERPLEADER AND DEPOSITED THE PROCEEDS OF THE POLICY IN THE COURT. THE PROPERTY WAS THEN IN POSSESSION OF THE TRIAL COURT.

The United States Court of Appeals, Tenth Circuit, found:

> ". . . with the commencement of the suit and the initial orders of the court, that 'property' was in the possession of the trial court. It never was in the possession, actual or constructive, of the company, the widow, or the Receiver. The fund was thus held by the court or the clerk, and against which they could assert their claims. The initial holding was adverse to both claimants and it would not be released until one of them asserted a superior right as part of, and during the course of, the proceedings contemplated. A similar adverse position was asserted or represented by the insurance company at the time it started the action, and by its commencement of the action. . . ."

The Court further found:

> ". . . The nature of the possession by the insurance company and by the clerk, and the relationship thereof to the Receiver, was sufficient to vest jurisdiction in the trial court as against the summary powers of the bankruptcy court. This is consistent with Katchen v. Landy, 382 U.S. 323, and Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426."

In the similar case of *Glens Falls Insurance Co.* v. *Strom*, 198 F.Supp. 450 (1961), that Court said:

> "The property or res involved herein are the proceeds of the insurance policies. They are not now nor ever were in the *actual possession* of the Puerto Rican

court. Tilley, trustee in bankruptcy, contends however, that they were in the constructive possession of the bankruptcy court. Constructive possession occurs where the property is held by a person other than the court or the trustee who makes no claim to it. . . ."

See also *Dannel* v. *Wilson-Weesner-Wilkinson Co.* (6 Cir., 1940), 109 F.2d 364.

To the same effect is *In re Herz Importing Corp.*, 349 F.Supp. 1106 (S.D.N.Y., 1972), wherein the Court held that the insurer in an interpleader action, in effect, was asserting an adverse claim and thus the trustee did not have either actual or constructive possession of the disputed fund to create summary jurisdiction. In arriving at its decision, the Court made the following observation on page 1112:

"The summary jurisdiction of a bankruptcy court is considered more expeditious and hence a more economical form of administration of matters involving a bankrupt and a procedure which more effectively protects creditors and the estate. Of course, these benefits may not override the safeguards against undue celerity or be used as arguments to deprive one of substantial rights, which include the right to a plenary proceeding to adjudicate the claims of an estate.

"The present case provides such an instance where expedience threatens to endanger substantive rights. Whether the contentions of the petitioner or those of the trustee can be sustained is something to be determined in a plenary suit."

CONCLUSION

The Court of Appeals committed no error. Its decision is in harmony with other case law, with the applicable statutes, and with equity. It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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April, 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RECEIVED
AND FILED
JAN 29 1973
JOHN FLOWERS
REFEREE

IN THE MATTER OF	)	IN PROCEEDINGS FOR AN
WORLD MARKET	)	ARRANGEMENT UNDER
CENTERS, INC.	)	CHAPTER XI OF THE
DEBTOR	)	BANKRUPTCY ACT
	)	NO. BK-4-1728

ORDER

It having been presented to this Court that the United States District Court for the Western Division of Oklahoma in Cause No. 72-795 Civil, styled Guarantee Reserve Life Insurance Company vs. June E. Hardin and World Market Centers, Inc., has taken complete jurisdiction of the controversy with respect to Policy No. L 4 003 597 issued by Guarantee Reserve Life Insurance Company upon the life of Milton A. Hardin, and that it has jurisdiction over Guarantee Reserve Life Insurance Company, June D. Hardin, and World Market Centers, Inc., and its receiver in bankruptcy, Ben M. Gilbert, and it appearing to the Court that the face value of such policy in the amount of $100,000.00 has been deposited into the registry of the United States District Court for the Western District of Oklahoma, and that it is subject to the jurisdiction and decrees of said Court, and the Court finding that therefore Guarantee Reserve Life Insurance Company and June D. Hardin, previously cited to appear and answer herein, should be dis-

missed from this proceeding until further Citation, and that prior Orders of this Court enjoining temporarily the activities of such parties should be dissolved;

IT IS THEREFORE ORDERED that the preliminary injunction issued herein dated December 19, 1972, and that the Order of Continuance entered herein on the 29 day of December, 1972 be and they are hereby dissolved, and defendants, Guarantee Reserve Life Insurance Company and June D. Hardin, are herewith discharged as to any further proceeding in this Court until further Citation.

SIGNED and ENTERED on this the 29 day of January, 1973.

s/ John Flowers
Referee

Approved:

s/ William O. Callaway, Jr.
William O. Callaway, Jr.

s/ Roger A. Hansen
Roger A. Hansen

A TRUE COPY

ATTEST: 2-7, 1975
JOHN FLOWERS, BANKRUPTCY JUDGE

By [illegible]
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RECEIVED
AND FILED
DEC 19 1972
JOHN FLOWERS
REFEREE

IN THE MATTER OF	IN PROCEEDINGS FOR AN
WORLD MARKET	ARRANGEMENT UNDER
CENTERS, INC.	CHAPTER XI OF THE
DEBTOR	BANKRUPTCY ACT
	NO. BK-4-1728

PRELIMINARY INJUNCTION

This cause came on to be heard on a show cause order issued by the Bankruptcy Court on December 1, 1972, directing June D. Hardin and Guarantee Reserve Life Insurance Company to show cause why they should not be enjoined from further proceedings in CIV-72-795 pending in the United States District Court for the Western District of Oklahoma until further order of this Bankruptcy Court, and having heard oral evidence and considered the exhibits introduced as evidence and for the reasons set out in the Findings of Fact and Conclusions of Law, it is therefore;

ORDERED, that June D. Hardin and Guarantee Reserve Life Insurance Company are restrained and enjoined from doing any act or initiating or continuing any proceeding except as to CIV-72-795, styled Guarantee Reserve Life Insurance Company vs. June D. Hardin and World Market Centers, Inc. pending in the United States District Court for the Western District of Oklahoma, until further order of the Bankruptcy Court.

ENTERED this 19 day of December, 1972.

[APPENDIX]

s/ John Flowers
John Flowers

Referee in Bankruptcy

A TRUE COPY

ATTEST 12-19, 1972

s/ John Flowers
John Flowers

Referee in Bankruptcy

CERTIFICATE OF SERVICE

I hereby certify that the following who are all of the parties required by law to be served in the above case, were this day each mailed three copies of the foregoing Brief in Opposition, postage prepaid:

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DATED this 8th day of April, 1976.

Joanna S. Sepkowitz